AN ARBITRATION UNDER AUSPICES OF THE

CALIFORNIA STATE MEDIATION AND CONCILIATION SERVICE

Riverside City Teachers Association)

and) Case # ARB-02-0918

Riverside Unified School District)

D E C I S I O N

Appearances:

Marianne Reinhold, REICH, ADELL, CROST & CVITAN PLC, Los Angeles, CA, for the Association.

Jack B, Clarke, Jr., BEST, BEST, & KRIEGER LLP, Riverside, CA, for the District.

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David G. Heilbrun, Arbitrator (as selected from a California State Mediation and Conciliation panel; hearing conducted March 24, 2003 at Riverside, CA.

INTRODUCTION

The parties had a "1999-2002 Agreement for Certificated Bargaining Unit," having a renewable term that expired on June 30, 2002. "Grievance Procedures" were provided in Article XIX of this Agreement. A preamble to Article XIX defined a "grievance" as any "alleged violation, misinterpretation, or misapplication" of the Agreement. Further, the term "grievant" was agreed to synonymously "include either the employee or the Association, whichever is applicable." (emphasis supplied). Finally, the Association could elect to file a grievance directly with the District at Level Two (II), provided such grievance was signed by the organization's President or a designee.

The grievance in this case was filed by the Association at supposedly permissible Level Two (II). Soon after opening the hearing, a caucus ensued between the parties. Following this, they agreed to bifurcate the proceeding by dealing only with a procedural issue of whether the grievance was timely filed.

PERTINENT CONTRACT PROVISIONS

Article XIX placed strict time limits on the parties. Explicit Section 4 of Article XIX requires that any waiver of these time limits must be "by written agreement between the parties." Other fundamental contract language provided that any aggrieved employee "may reduce such matter to writing within ten (10) days after the [grievant] has knowledge or reasonably should have knowledge of the event which caused the grievance . . . ."

As to an arbitrator's authority, the Agreement reads:

"The arbitrator shall have no authority to add to, subtract from, or change any of the terms and conditions of this Agreement. The arbitrator's decision must be based upon the arbitrator's interpretation of meaning or application of the language of the Agreement."

An overriding provision as to Article XIX time limits states they ". . . shall not apply between June 20 and September 1."

SUMMARY OF THE CASE

In Poly High School of this District, the Counseling Department ordinarily consisted of four individuals serving the regular student body.[1] Within a month of starting the 2001-2002 school year, one of the four traditional counselors left Poly High and never returned during the rest of that school year.

The three remaining regular counselors began covering the student body's counseling needs by informally dividing the missing counselor's workload into equal parts which they absorbed into their own workday. This configuration continued throughout autumn months, however dismay mounted over such an unexpected and indefinite development. Head counselor Rose Monge then arranged for placing an agenda item at the monthly department meeting of December 13, 2001. It read: "Counseling caseload/Compensation?."

The meeting took place as scheduled with Frank Paredes, Poly High Principal, Charles Hiroto, Assistant Principal-Curriculum & Guidance, Monge, plus remaining regular Counselors Rodney Hoopai and Valerie Titus there.

Testimony provides differing versions of what was said on the subject at this meeting. However continuing attention happened later in December 2001 and into year 2002. Pertinent verbal communication comprised discussions among and between District administrators, Association representatives, and the Counselors themselves. As this ensued the

[1] Other persons, not involved in this matter, provided counseling to special education pupils, those in defined special programs and "Newcomers" to this magnet site of the District.

Poly High Counselors continued a practice of recording extra hours spent on extended load, as they each had begun doing by commencing the practice from mid-November 2001 onward.

The first overt manifestation of a dispute in the making appeared as a memorandum dated June 3, 2002 from Paredes to Counselor Titus. In this he declined to pay for additional hours, after Titus had actually presented time cards to him for extra pay. Thereafter Dennis Hodges, Association President, filed the Level II Grievance, identifying the date of its operative event as June 17, 2002 and signing it when filed on August 14, 2002.

DETAILED EVIDENCE

Paredes testified that as the school year went through its early months, he had no idea when, or if, the departed Poly High Counselor would return to duty. By December 13, 2001 the remaining Counselors were openly talking about the prospect of obtaining overtime pay for doing needed coverage.

With such talk in the air, Paredes spoke to Glenn King, Assistant Superintendent-Human Resources about the subject. Paredes recalled King responding with comment of intention to look into it and "check with Personnel."

Parades described his practice of sporadically attending monthly meetings of Counselors, but not necessarily remaining there throughout. As to his own presence during the December 13th meeting, he denied stating that he personally would look into the matter.

Hiroto is the immediate supervisor of Poly High Counselors. He testified of general discussion following a regular Counselor leaving practically at the beginning of a new school year, and a sense among the group remaining how the three would "pick up" the open 9th grade workload. He basically referred any pressing questions about compensation, as that was being "brought up" among the remaining Counselors, to Paredes. Hiroto emphasized that he was not authorized to approve such extra pay.

As to happenings at the December 13th meeting, Hiroto does not recall telling, inviting, or directing Monge to keep a record of extra hours worked as a participant filling in with other colleagues. He does, however, recall that during or shortly after the meeting, he engaged Counselors with innocuous musings about how they could keep track of hours; but without knowing what any outcome might be.

William Sumner was Director of Certificated Personnel at Poly High during the 2001-2002 school year. He recalled taking two telephone calls in his office from Paredes on this subject. Sumner clarified that the departed Counselor had been suddenly placed on administrative leave very early after start of the new

school year. His first call from Paredes occurred immediately following this Counselor's inconvenient departure. This initial conversation focused principally on prospects for locating a qualified substitute, retired or otherwise. The second call from Paredes was about a week later. Here Sumner testified how Paredes told of having met with his group of remaining Counselors, who advised him they were not likely to need help in the situation after all.

King was the last witness called by the District. He has occupied the current Assistant Superintendent position for nine years. King testified to a discussion with opposing counterpart Hodges right about the New Year. In this conversation, as King recalled it, Hodges expressed irritation over Paredes just telling him the Counselors here at issue would not be getting paid for extra work. Beyond this, such first noteworthy conversation was inclusive.

King recalled having a second conversation with Hodges on the subject in April or May 2002. However King asserted that never in this, or any other conversation, did he voice what even could be considered a suggestion that Counselors would by paid for what by then was an extensive amount of extra work. King does recall this animated meeting with Hodges in April or May 2002, which he was uncertain had been attended by any other person. Consistent with his testimony about various verbal exchanges, he was dismayed to see his name parenthetically mentioned in the Level II grievance as having intimated that extra Counselor pay was deserved.

In the chronology of things this was also about, or shortly before, Titus presenting her locatable time records of extra hours worked to Paredes. The verbatim content of his June 3rd memorandum to Titus, copied to all Counselors, Hodges, King and Hiroto, reads:

"I have received your time cards and I will not be signing them for the following reasons: 1. None of you have spoken with me about working additional time. [and] 2. I gave you no authorization for 1½ each day from November 15, 2001 to April 30, 2002. I have checked with Mr. Hiroto and he states that he never gave you any directive to work an additional 1½ hours overtime each day. He also states that you never had any discussion with him regarding this issue."

The Association's statement of Level II grievance reads:

"The District violated Appendix A5 – Extended day Salary Schedule and all other applicable and/or related sections of the Certificated Bargaining Agreement by failing to honor timecards submitted (as per suggestion of Assistant Superintendent Glenn King) by three Poly Counselors (Rodney Hoopai, Rose Monge, and Valerie Titus)." Predictably, the grievance sought a monetary remedy of pay for hours of service in dispute and interest per California Education Code section 45049.

King denied the grievance on September 24, 2002 by written answer enumerating the following reasons:

1. Appendix A5 of the bargaining unit agreement pertains to a classroom teaching assignment that exceeds five instructional periods. Counselors are not classified as classroom teachers.
2. The collective bargaining unit does not specify caseload maximums for school counselors
3. Evidence presented at Level II did not show proof that the counselors worked outside of their normal workday or that the counselors sought permission or approval to work outside of their normal workday.
4. Frank Paredes, principal of Poly High School, indicated that he did not authorize additional hours of employment for the counselors during the stated time period
5. The grievance was not filed in a timely manner. .

The Association presented two witnesses in support of its position on the single narrow issue now comprising this case. Hodges testified that his first awareness of the subject arose in February 2002. The occasion was an inconclusive contact with Sumner. Subsequently that month Hodges spoke with Sumner again, in context of the four Counselors' situation, "to figure out what had happened." Here too, Hodges denied receiving any definitive answer to the prospect of extra pay for the Counselors constant coverage of spending extra hours at their school.

Hodges testified further that time passed until he met with Paredes on May 3, 2002 to discuss the subject. In this conversation Hodges asserts that Paredes "didn't much respond," and made no commitment to action one way or the other. Hodges then met with King about the subject for the first time on May 8, 2002. Exchanges between King and Hodges were animated on this occasion. Hodges recollection of the Assistant Superintendent's remarks were a reference to the general manner of District funding for Counselors, a vague reference to somehow settling the controversy, and, most significantly, that King ventured how a "logical thing [for the claimants to do] was submission of their timecards.

Karen Villarreal, employed at the time by California Teachers Association, was present during this meeting. She testified that the matter of Counselors' extra pay at Poly High was one of a number of subjects covered that day. Villareal corroborated Hodges about King making the timecards remark.

Although Hodges was copied the Paredes memorandum of June 3rd, he testified to seeing no communication, or having any verbal contact from a District official, on the subject until June 17, 2002. Hodges noted how a new mailing system had gone into effect, and further, he that had been occupied during the interim from June 3rd onward by travel to Sacramento and Hawaii.

CONTENTIONS

The Association contends that no contractually labeled "event" occurred until Paredes written denial on June 3rd of "additional" overtime pay From this, the Association notes that Hodges, the person authorized to initiate a Level II grievance, did not learn of the development until June 17th. The implication here is that Hodges should not be thought to have reasonably had knowledge of "the event which caused the grievance" at any earlier time. Further, the Association terms this circumstance "a Continuing Violation" which tolls any time limit in which to file.

The District contends that Hodges was adequately informed by King as early as December 2001 or January 2002 that Counselors would not be paid for necessary coverage because one of their department was not continuing in the school year. The District also believes that other administrators more than adequately informed Counselors that they could not expect extra pay over the fact that they had taken on more than the usual number of students for their services. Additionally, the asserted clarity of such information established a point in time policy statement that made arbitration doctrine about continuing violations of a collective bargaining agreement irrelevant to this case.

DISCUSSION

Pertinent language of this collective bargaining agreement contains a particularly stern, two-sentence admonition that an arbitrator not tinker with express contractual language respecting agreed-upon Grievance Procedures.

This admonition is not to be ignored, but does invite comparisons with how such a limitation has been contrasted in past arbitration decisions. These may be characterized as applying either; (1) a strict constructionist attitude giving such limiting language full compliance, or (2) a contrasting view embodying reasons of (a) seeming equitable need, (b) belief that an implied "fairness" component was always to be considered, or (c) downright determination that a "harsh" result not be permitted.

A succinct example of the first approach may be found in *Ventura County Community College District*, 114 LA 1503 (Sara Adler, 2000). Here a point in time came into existence when a grievant, if acting with reasonable diligence (as the arbitrator came to write), "had all the information . . . which she needed to easily determine that the District might be offering her the wrong pay for [a certain] overload assignment." Then casual discussion with a colleague took place several months after the pertinent point in time. The grievant, a professor, had been spurred by this discussion to file a grievance this same "several months later", in the face of a contractual provision on timeliness.

This provision gave 15 days to file after a person, "first knew, or by reasonable diligence should have first known" of the basis to grieve. Noting this plainly stated 15 days, the arbitrator commented, "she [grievant] should have known much earlier because all of the pieces were known to her." Accordingly, the arbitrator held the grievance to be untimely and therefore not arbitrable.[2]

A marked contrast, illustrative of the second approach above, is found in *Willow Run Community Schools*, 112 LA 115 (Deborah M. Brodsky, 1999). Here, the arbitrator refused to dismiss the grievance on grounds of untimeliness.

The school district's superintendent had rendered a fourth step grievance denial, and sent it to the union's Chapter Chairperson via intra-district mail. The contract of these parties permitted 10 working days within which the union might notify the district of its intent to arbitrate the grievance so denied. A failure to so notify would be deemed "abandonment" of the grievance.

Context of the *Willow Run* case involved the union's Chapter Chairperson having undergone a heart catheterization during the month focused upon, and a district representative's admission that, "on some days there were problems with intra-district mail." Clearly, however, the union's ultimate notice of intent to arbitrate was in a 10–15 day range of lateness.

The arbitrator denied condoning, "any possible laxity in timeliness," but nevertheless excused a lack of diligence. She observed that "circumstances" would make it "unduly harsh" for her to adopt the "abandonment" notion, and held as to this threshold issue that the grievance was "arbitrable on the merits."

Similar loose liberality was exhibited in *Los Angeles Community College District*, 116 LA 518 (Joseph F. Gentile, 2001). This district had paid its faculty insufficient amounts for "PAL" (personal annual leave) days. The arbitrator here excused a Federation of Teachers Guild from a procedural defense to arbitration, finding that "PAL" underpayments "were of a 'continuous' nature, as that term is used in labor-management arbitration proceedings."

I believe the approaches exemplified above provide only a general context for what must be interpreted and applied out of the Agreement here. This is so because a sharp conflict in testimony exists concerning the essential nature of communication between the parties over course of the school year. Therefore credibility resolutions are necessary respecting the several persons who testified. I am basically persuaded to adopt a set of facts described by Association witnesses. In general the two of them, Hodges and Villarreal, testified in a more assured, distinctively detailed, and credible manner.

[2] See, in same general vein, *Middletown City School District*, 111 LA 1234 (Jerry Fullmer, 2000); *Niles City School District*, 112 LA 5678 (Daniel Zieser, 2001).

The testimony of Paredes, while sincere, did not impress as offering his own solid confidence in memory. Aside from subjective demeanor factors, he did dolefully muse that "it's been a while" and "so many things [were] going on" about Counselors

I must from such disclosure entertain reservations about his testimony. Beyond this Paredes is shown from the minutes of the monthly Counselor meeting of December 13th that he at least agreed to "look into bringing a retired counselor from RUSD to help out." Paredes familiarly named the transcriber of meeting minutes as Bea Miller (phonetically), and seemed to see accuracy in what the minutes recited. For this reason a tone of uncertainty about the District's position on extra Counselor pay was set early on.

The testimony of Hiroto and Sumner was essentially neutral regarding the important factual issue of Hodges' claimed knowledge, actual or imputed, that a grievable event had arisen well before June 17th. King was the District's key witness in support of this contention.

After full thought on the point, I cannot credit King's testimony as to any controlling verbalisms that exchanged between the parties. Here again his testimony was too unassured, and inferior to Hodges in terms of specifics as to time and pure recall of words spoken. Among such deficiencies were (1) some vagueness even as to the month of discussions, (2) an express concession that a "possibility" existed he had suggested Counselors "turn in" timecards while awaiting further developments as to payment, and (3) uncertainly even that Villareal attended the critical meeting of May 8th, the actual truth of which I resolutely accept.

Based on the foregoing, a decision on this issue, as bifurcated from rest of the case, turns exclusively on factual determinations which in every salient regard favor the Association's contentions. Counsel for the District did cite a number of authorities in his brief on this case. Notwithstanding my controlling view of the issue, I believe comment on these authorities is warranted.

The District has cited California Code of Civil Procedure section 1005.5, entitled "Making and pendency of motion." The analogy to this point in general civil law is too strained to have effective value here. Indeed the distance between this Code provision and grievance/arbitration notions under a collective bargaining agreement is much too great. Such was illustrated in the recent *APRI Ins. Co. v. Superior Court*(1999), 76 Cal.App.4th 176, as modified, in which the Court looked to the interplay between CCP sections 1005.5 and 581.d in resolving a "technical point" to grant a petition for mandate.

Comparably in the *Engalla* case, also cited 64 Cal.Rept.2d 843, the context was health care arbitration and an HMO's action to compel arbitration. Finally, the 1961 *Broadway-Hale* case merely restates fundamentals as to applying contractual language in relation to arbitral authority

Thus, this grievance concerns a backdrop in which frequent.discussions between the parties over an extended time period left Counselors and their chief representative with only wistful uncertainty as end of the second semester approached. Distillation of all that was said lacks a showing that the District gave any positive pronouncement before June 3rd that it had determined, or would determine, to withhold additional compensation for Counselor hours spent on the special needs of this particular school year.

Titus for sure, and the two other affected Counselors presumably soon thereafter, learned on or about June 3rd that the long-festering question of extra compensation had been resolved against them. However this knowledge cannot be imputed to Hodges. As Association President he qualifies the organization for separate standing within meaning of the Agreement. Such status is not lost just because Article XIX – Section 1 equates an employee or the Association, and defines each of them with an identical capacity to grieve. However, utilization of the Association's privilege to initiate grievances at Level II carries inferential meaning that it must be an agent of the Association whose knowledge, or lack of same, about a grievable event is to be measured. No basis exists within the facts of this case to conclude that Hodges was at fault in not gaining earlier knowledge of the answer to what had so long been in question.

A W A R D

Accordingly, I hold that the Association's Level II grievance is not untimely, and further arbitration proceedings are entitled as to any underlying case merit.

Dated: August 28, 2003

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David G. Heilbrun